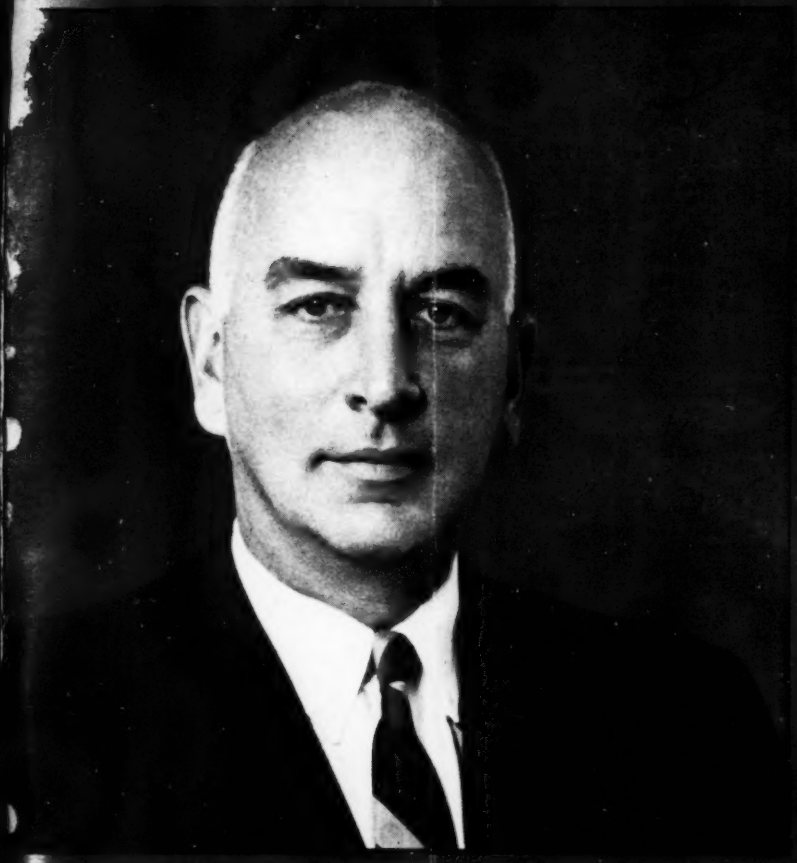

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CONTENTS

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BOARD OF TRUSTEES, LOS ANGELES COUNTY BAR ASSOCIATION, 1960-61

Seated, left to right: Paul R. Hutchinson, A. Stevens Halsted, Jr., Grant B. Cooper and Maynard J. Toll.

Standing, left to right: George W. Cohen, Stanley L. Johnson, Vincent R. Fowler, Lester E. Olson, Irving P. Austin, Hugh W. Darling, George Harnagel, Jr., Frank C. Weller, James L. Potts, A. Hale Dinsmoor, Leslie C. Tupper, Loyd Wright, Jr., Judge Louis H. Burke, Edward S. Shattuck, A. R. Kimbrough, James H. Kindel, Jr.

Not shown: Walter Ely, Sharp Whitmore, E. Burdette Boileau.

THE PRESIDENT'S PAGE

☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ GRANT B. COOPER

» » IT IS A YEAR since I assumed the presidency of our large and thriving organization . . . a twelvemonth which has passed on flying feet . . . a period far too short, it seems, to have accomplished all the objectives entertained at its beginning.

And now it's time for me to hand the "torch" to our new president, the very able, sound and respected A. Stevens Halsted, Jr., whose services to the Association and to me personally during my term of office already entitle him to the gratitude of our membership. Before I do this, I should like to review my year as your president, to cast up the accounts of my stewardship, to submit to the membership some observations on our progress and the current status of our association.

Let's see how we have fared in our efforts to reach or approach the goals in the four-point program outlined in the March, 1960, BULLETIN:

1. *A new home for the Association* The January, 1961 BULLETIN carried a detailed report of our negotiations in quest of accomodations in the projected Los Angeles Music Center. Progress will continue to be made to the end that we shall eventually have our own quarters, adequate and creditable for one of the largest and most respected professional associations now serving its membership and the public.

2. *Reorganization of our committees into sections (in principle as in the American Bar Association), thus providing a broader base of participation in our Association affairs in which every member interested in his own specialty can participate.* In addition to the Tax Section there have been added and organized into sections the Corporate Law Departments Committee and the Committee on Probate and Trust Law. This complete change from committees to sections cannot be accomplished overnight, but in time I believe every committee whose interests and activities lend themselves to such reorganization will make the change. I'm enthusiastic over the response and interest shown in the sections already organized.

3. *The Bulletin.* Our monthly publication has continued to improve in cover, format and content, and I believe is more interesting than ever before. An effort is made to see that the cover ties in with the principal contents of each issue; that historical photographs—sometimes of an early day lawyer or courthouse—are used when appropriate.

4. *Membership.* We had planned to launch a drive for new members, even though our present roster contains the largest number of names in active participation in our history. But it was felt that it would be better to withhold the kick-off on this until our other objectives had been reached or approached so that the Association would have even more to offer to our

members. However, the format for this drive has been prepared and should bring fine results when eventually implemented.

It is gratifying to report that our Association has entered the machine age, in a manner of speaking. We have purchased an $8,000 ultra-modern addressograph machine to speed up our mailing and billing as well as to perform other useful functions now performed by human hands. Not only should this equipment pay for itself in from three to five years, but it will obviate the necessity of adding an additional employee to our staff.

The slight increase in dues voted overwhelmingly by our membership has enabled us, among other things, to enlarge our headquarters to provide a much needed large and air-conditioned room for committee and other meetings, in addition to maintaining a sound, healthy and balanced budget.

This year has also seen our Christmas Jinks move from the Breakfast Club to the enlarged and modern facilities afforded us at the Statler Hotel. For the first time we have been able to accommodate everyone who wished to attend. The approval of this move by the membership was demonstrated by the largest turn-out in our history, which incidentally acclaimed the Jinks as one of the best in recent years.

I shall have to leave to my successor the planning and adoption of a long-range program and the establishment of goals to meet the ever-increasing demands and opportunities for service to a steadily increasing general population as well as our Association membership.

Happily our new President is a man of such outstanding ability combined with a dedication to the Association affairs that I foresee for him a strikingly successful administration.

To everyone who has worked so hard, willingly and unselfishly during my term I say "Thank you ever so much." I would like to be specific and thank each by name but the space allotted to the President's Page will not permit me this indulgence.

It has been a great privilege and a valued experience to have served as your president in 1960. I shall forever treasure the recollections of this year.

I regret that my commitments as a lawyer prevented me from devoting as much time to my duties and opportunities as I should have liked. I wish that I had achieved or even approached all of the goals I had set in my own mind for the Association's advancement, but I nevertheless leave the office happy in the knowledge that each new administration carries forward with renewed vigor and with increasing success.

My term in office has not only heightened my pride in the profession of the law but has also convinced me that ours is one of the finest professional associations in the land, and I am everlastingly grateful for the opportunity to have served you as its president.

THIS MONTH'S COVER

On the front cover of this issue appears a picture of the new Los Angeles County Bar Association President, A. Stevens Halsted, Jr. The 1960-61 Board of Trustees are shown on page 108.

PROFILE

A. Stevens Halsted, Jr.

President of Los Angeles County Bar Association for 1961

» » BECOMING THE HEAD of California's largest local Bar Association is a logical highlight in the career of A. Stevens Halsted. It combines perhaps the three dominant elements in his life: a love and respect for the practice of law, a long time interest in Southern California, and a devotion to public service.

Mr. Halsted was born in Pasadena in the year 1907, a third generation Californian. His paternal grandfather was one of the earliest settlers in the city of Alhambra in 1877. His paternal grandfather in the early 1890's was the rector of Pasadena's All Saints Episcopal Church. His father was a prominent practicing Los Angeles attorney, who also was a long time member of the Los Angeles Bar Association. The last years of his father's career were spent as general solicitor of the Union Pacific in Los Angeles.

His father died in 1932, a few months before young Steve was admitted to the Bar in Los Angeles. He had prepared for the law at Stanford where he earned a Bachelor Degree in 1929, as well as a Phi Beta Kappa key, and at the Harvard Law School, from which he graduated in 1932. Immediately after being admitted to the Bar he went to work for the firm which is now Macdonald & Halsted. He specializes in corporate and general business law and is immensely grateful to his partners who spare him the burden of trying cases.

An important part of Mr. Halsted's life is his love for the history of the West and the enjoyment of the natural beauties of the West. He is an avid camper, spending much of his free time in California's Sierras and, in the winter, on California's deserts or along its ocean front. On these trips he has been accompanied by many children, both his own and others, and he feels that these occasions have given him the opportunity of sharing his love of the outdoors with the young people.

Mr. Halsted has put his interest in California history to a number of good uses. For many years he contributed a monthly feature to the BULLETIN known as "Silver Memories" – recollections of events taking place twenty-five years before. When President Gray commenced the project which culminated in the publication by the Association of the book about the Los Angeles Bar, *Lawyers of Los Angeles*, Mr. Halsted was appointed to the Publication Committee. The rest is history. The book, the first such volume published by a local bar association, has received the almost universal acclaim of its readers who find that with it they can gain some of the insight into the early days of Southern California.

We discussed with Mr. Halsted what he hopes to accomplish as President of the Association, when he is inaugurated on February 23. He answered that he would spell out his platform in some detail in his first President's page which will appear in the next issue of the BULLETIN. He indicated that he had specific plans for strengthening ties with the thirteen affiliates of the Association and for organizing and regulating the work of the sections and committees of the Association. He also discussed the need for increased participation in Law Day observations and moving ahead in the plans for quarters for the Association.

We asked a bit about his family and were told about his wife Anne, who is an artist, his daughter Croftan, who is presently working in San Francisco after having attended Smith College and having graduated from the University of California (Berkeley), and his son, Steve, also a Phi Beta Kappa from Stanford and at present on active duty in the United States Navy as an electronic engineer at the National Security Agency. But it was quite clear that the real star of the Halsted family was its newest member, granddaughter Suzanne, born on the 8th of January of this year. She looked just like a fifth generation Californian should look. We agreed that things have certainly changed a lot since her great great grandfather arrived in California in 1877. The Halsteds had made valuable contributions to such change. Mr. Halsted seemed downright anxious to get to work making new contributions to the life of Southern California, and it is quite clear that the Los Angeles County Bar Association will be greatly richer by reason of his efforts.

BAR ACTIVITIES

Calendar

Los Angeles County Bar Association

Committees

February 16—Legal Ethics

Sections

February 15—Corporate Law Departments, California Club, dinner, 6:30.

February 16—Probate and Trust Law, Conference Room #1, Biltmore, luncheon, 12 noon.

Junior Barristers

February 17—Monthly luncheon meeting, University Club, 12 noon (installation of new officers)

General Monthly Meeting

February 23—Annual Meeting and Installation of new officers and trustees, Biltmore Bowl, 12 noon. Speaker, Dr. Frank C. Baxter. Topic, "The Complacent American."

Affiliated Associations

State Bar of California

September 25 to 29—Thirty-third annual meeting, Monterey.

American Bar Association

February 17 to 22—Mid-winter meeting, Edgewater Beach Hotel, Chicago.

August 7 to 13—Annual Meeting, Chase-Park Plaza Hotels, St. Louis, Mo.

(Official announcements concerning events of interest to members of the Los Angeles County Bar Association will be included in the Calendar as space permits. The deadline for submission of dates is the 25th of the prior month.)

Pasadena Bar Association

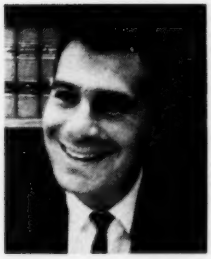
February 15—Dinner meeting, University Club, Pasadena.

Beverly Hills Bar Association

February 22—Golf, Ojai Valley Country Club. All-day affair.

EICHMANN: Murder Trial Without Precedent

By ZAD LEAVY



Zad Leavy, a Deputy District Attorney of Los Angeles County, is on a year's leave of absence in Israel, where he will witness the Eichmann trial and participate in a criminal law seminar at the Hebrew University in Jerusalem. A native Californian, he received his LL.B. from UCLA in 1958, and has been with the Trials Division of the District Attorney's Office since 1959.

» » THIS MARCH IN JERUSALEM, Lieutenant Colonel Karl Adolf Eichmann, of the Nazi Gestapo and SS, will go on trial for his life. Never before has a single forum been faced with so many momentous legal issues in such dramatic fashion. Never before in the history of man has any one person been charged with masterminding the systematic extermination of so many millions of people. Judging from the evidence on record at Nuremberg, and from recent reports of the case now being compiled, the evidence against Eichmann will tell a horror story of mass-torture, death and genocide hardly imaginable. This story will be related by more than 400 newsmen to the entire world. Indeed, this will be the most unique murder trial of all time.

Since Eichmann's controversial cloak-and-dagger capture in Argentina last May, and his clandestine removal to the State of Israel, carefully engineered and executed by secret agents of the Israel Government, he has been arraigned before a magistrate and is now being held under maximum security conditions at a secret location in Israel to avoid attempts at suicide or assassination.

I. The Mechanics of Trial

The Israeli indictment charges Eichmann with violation of the NAZIS AND NAZI COLLABORATORS (PUNISHMENT) LAW,[1] en-

[1] 4 Israel Laws 154 (5710-1949/50), authorized translation from Hebrew to English, Israel Govt. Printer Jerusalem. §1:

(a) A person who has committed one of the following offences—

(1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;

(2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;

(3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime,

is liable to the death penalty.

(b) In this section—

"crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

(1) killing Jews;

(2) causing serious bodily or mental harm to Jews;

(3) placing Jews in living conditions calculated to bring about their physical destruction;

(4) imposing measures intended to prevent births among Jews;

(5) forcibly transferring Jewish children to another national or religious group;

(6) destroying or desecrating Jewish religious or cultural assets or values;

(7) inciting to hatred of Jews;

"crime against humanity" means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

"war crime" means any of the following acts: murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian popula-

acted in 1950, which prescribes capital punishment for crimes in any one of three categories: "Crimes against the Jewish people, crimes against humanity and war crimes."

The trial will be held in the new Knesset (Parliament) building, now being readied for that purpose. Although it is to be conducted in Hebrew, the official language of Israel, there will be simultaneous translation for the defendant, officers of the court, and newsmen and spectators into German, English and French. The forum will be the District Court of Jerusalem, a court of general jurisdiction which normally hears major criminal cases.

There will be three to five judges assigned (Israel law does not provide for jury trials), although at this writing no particular jurists have been appointed. Each judge will have a mastery of the three major languages used by officers of the court. In the light of the political overtones in this case, it is to be noted that section 13, of the Israel Judges' Law, provides that "In judicial matters a judge is governed by the law alone."[2]

Eichmann's defense counsel, Dr. Robert Servatius, who has a commercial law practice in Cologne, was retained by the defendant's family because of his experience at the Nuremberg trials, where he defended Fritz Sauckel. Sauckel was accused of organizing slave-labor groups, and was subsequently convicted and executed. Dr. Servatius served in the German army during World War II, but was never a member of the Nazi Party. His fee of $20,000, including costs, will be provided by the Israel Government, and the court has appointed a member of the Israel Bar to assist with procedural matters.[3]

Israel's broad criminal discovery rules will allow Dr. Servatius, in advance of the trial, to examine the government's physical evidence and to be furnished with the names of prosecution witnesses. The defense lawyers at Nuremberg had no benefit of such rules, and thus found it difficult to prepare cross-examination and counter-evidence.

II. Evidentiary Issues

Israel follows the English common law with respect to rules of evidence,[4] and this raises the question of the admissibility of certain anticipated evidence. Because of the obvious difficulty in obtaining certain witnesses, the prosecution will offer affidavits in lieu of actual testimony, as well as portions of transcripts from the various war crimes trials, the latter having already built up damning evidence against Eichmann. Any Anglo-American lawyer would immediately recognize this as hearsay, and furthermore, since the various war crimes tribunals made heavy use of affidavits, admission of the transcripts at Eichmann's trial will involve hearsay upon hearsay. Israeli legislators must have anticipated this problem, however, by providing in section 15(a), of the statute under which the defendant will be tried, that "[i]n an action for an offense under this law,

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tion of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

[2]Goitein, *A Legal Note: The Israel Judge's Law*, 41 A.B.A.J. 1028 (1955).

[3]The Knesset recently amended the Israel Lawyers Act to allow Dr Servatius (not a member of the Israel Bar) to defend Eichmann before the Israel courts. Reynolds *et al.*, MINISTER OF DEATH. THE ADOLF EICHMANN STORY, Viking Press, N.Y., 1960, p. 240.

[4]Warsoff, *The Legal System of the State of Israel*, 2 N.Y.L.F. 379 (1956); Bentwich, *The Law and the Courts of Israel*, 2 Zion 22 (1951).

the court may deviate from the rules of evidence if it is satisfied that this will promote the ascertainment of the truth and the just handling of the case."[5] Israeli officials have attempted to meet criticism of hearsay evidence by assurances that there will be more than enough first-hand, non-hearsay evidence upon which to base a conviction.

The prosecutor's primary evidentiary problem is to prove and pinpoint the defendant's exact role in Hitler's Final Solution for the Jewish Problem. Lieutenant Colonel was Eichmann's highest rank, but the government will attempt to show that he had great decision-making power and was fourth or fifth in the chain of command from Hitler.

The prosecutor must also prove that the *Final Solution* meant extermination of the Jewish people. Although the mass-extermination is a proved fact, the documentary evidence from the German army's files evidently do not contain such words as "kill, destroy and exterminate," but instead, "emigrate and evacuate." The prosecutor is compiling a voluminous glossary of Nazi terms to prove that the real *modus operandi* was camouflaged by the use of euphemisms.

III. Israel's Jurisdiction Questionable

Objections to Israel's jurisdiction will be raised by the defense, according to Dr. Servatius,[6] and will constitute the most interesting legal issues of the entire proceeding. Serious questions are presented by the kidnapping of Eichmann, and charging an individual for an act of the state, not committed on the forum's soil under, moreover a law which is *ex post facto*.

An objective discussion of the legal issues, however, requires one to disregard, at least for the moment, the practical, moral, and emotional considerations omnipresent in this case. These considerations will undoubtedly bear on the final outcome of the jurisdictional question, and may ultimately dictate the legal course to be followed.[7] The reasoning behind the legal decision, however, is most important in the long run, as it could under the *doctrine of stare decisis*, be used as persuasive authority in future cases in which the defendant's equities are not as starkly absent. The decision should, therefore, be based upon sound legal principles.

Does kidnapping the defendant preclude Israel's right to try him? The law in the United States, which is an extension of English common law and the law of nations has long been clear on this point. The U. S. Supreme Court, in *Ker v. Illinois* (1886), citing numerous English and early American cases as precedent, upheld, an Illinois conviction of a larcenist who was kidnapped by an American agent in Lima, Peru, and brought to Cook County for trial.[8] In 1952, the Court stated that it "has never departed from the rule announced in *Ker v. Illinois* . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction

(Continued on page 135)

[5] *Supra* note 1.
[6] Feldman, *Eichmann's Defense Hinted in Interview*, Los Angeles Times, Dec. 28, 1960.
[7] No other nation has requested Eichmann for trial. Roberts, *Eichmann's Trial Raises Complex Legal Problems*, Los Angeles Daily Journal, Sept. 7, 1960. Israel's Prime Minister Ben-Gurion has stated that for Eichmann to be tried in Israel before the Jewish people is a "moral imperative," and is to be viewed as "an act of supreme historic justice." MINISTER OF DEATH, *op. cit. supra* note 3, p. 214.
[8] *Ker v. Illinois*, 119 U.S. 436 (1886).

Refund Suits—Assessment Irregularities

By Lillian W. Stanley

Assistant United States Attorney for the Southern District of California (Tax Division). The views expressed herein are not necessarily those of the Department of Justice.

» » WHERE A TAXPAYER brings an action for refund of federal taxes, the issue in the case is whether the taxpayer actually overpaid his taxes. He cannot rely for his recovery on a procedural irregularity in the making of the assessment against him.

Technicalities in the theory of the assessment will not sustain a cause of action. Section 6212 of the 1954 Internal Revenue Code provides that if the Commissioner determines that there is a deficiency in respect of the tax of any taxpayer, he is authorized to send notice thereof by registered mail. Within 90 days after such notice is mailed the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency may be made until such notice has been mailed to the taxpayer nor until the lapse of the 90-day period. Under §6213(d) a taxpayer may waive the restrictions provided for. Section 6213-(b)(1) provides that if the taxpayer is notified that on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment has been or will be made on the basis of the correct amount, such notice shall not be considered as a notice of deficiency and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. The provisions of §6411 relate to and deal with tentative carry-back adjustments. Section 6213(b)(2) authorizes the Commissioner to assess the amount of a tentative carry-back adjustment determined to be excessive as a deficiency as if it were due to a mathematical error appearing on the face of the return.

Where the Commissioner has a choice of sections under which to make an assessment, the assessment will be sustained if properly made

BIOGRAPHICAL SKETCH OF LILLIAN W. STANLEY

Lillian W. Stanley is an Assistant United States Attorney, currently working in the Tax Division. She majored in accounting at UCLA and is a member of the California Society of Certified Public Accountants, as well as of the Federal Bar Association. She received her LL.B. from USC School of Law in 1956.

under any of these methods. He is not bound by the theory which he pursued at the time of making the deficiency assessment. Thus, where the Commissioner sent a notice of deficiency (90-day letter) to taxpayers stating that an amount credited to them by reason of a tentative carry back adjustment was excessive and then before 90 days had elapsed made an assessment pursuant to a waiver by the taxpayer which unknown to the Commissioner had been previously revoked, it was held that the assessment was valid because it could have been made without a 90-day letter on a theory different from that relied upon by the Commissioner, i.e. as if a mathematical error had been made. See *Blansett* v. *United States,* 283 F.2d 474 (8th Cir. 1960), decided under similar provisions of the 1939 Internal Revenue Code.

Every Nation Has a Patent Office

Every nation has a Patent Office. The South, during the Civil War, established a Confederate Patent Office, which received about 70 applications for patent per month. The Crown Colony of Hong Kong has what is largely a Trademark Office, but it also ratifies British patents for that Colony. Russia has a Patent Office in which even Americans may file applications for patent. The Soviets may never issue the United States citizen a patent, but what an excellent way to learn about our new inventions!

notes from your Law Library

by JOHN W. HECKEL • Head Reference Librarian, Los Angeles County Law Library

APPEALS: *The Common Law Tradition: Deciding Appeals* by Karl N. Llewellyn (Little, Brown, 565 p.) answers the growing cry of the bar that appellate courts decide cases not on precedent but on whim. Llewellyn contends that the courts do adhere to prior decisions and cites a series of opinions from various states.

BIOGRAPHY: *Due Process, The Story of George T. Davis* by Brad Williams (Morrow, 336 p.) is a journalistic account of a San Francisco attorney whose opposition to capital punishment led him into many cases where his daring and ingenuity served to save his clients from execution. He was involved in the Abbott and Chessman cases, as well as the Krupp trial in Germany. His use of sodium pentathol won an acquittal in the Long case. In the course of another trial, his use of the Koran oath helped win a verdict. *The Lawyer in Communism: Memoirs of a Lawyer Behind the Iron Curtain* by L. Kalman (St. Paul Editions, 179 p.) describes the courts and law in Hungary as they changed under the Communists. The author escaped during the uprising of 1956.

CALIFORNIA LAW REVISION COMMISSION STUDIES: Right to Counsel in juvenile court by Arthur H. Sherry; Presentation of claims against public officers by Arvo Van Alstyne; Rescission of contracts by L. A. Sullivan; and Survival of tort actions by L. V. Killion. These studies and recommendations will be considered by the California Legislature this spring.

COPYRIGHT: *U.S. National Bibliography and the Copyright Law* by J. W. Rogers (Bowker, 115 p.) is a historical study of the development of the *Catalog of Copyright Entries.*

FOREIGN INVESTMENT: *American Enterprise in the European Common Market: A Legal Profile* (University of Michigan Law School, 2 v.) collects a series of articles designed to assist attorneys whose clients are expanding into foreign markets. Corporate organization, exchange control, competition and taxation are among the topics discussed.

LEGAL HISTORY: *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* by A. M. Paul (Cornell, 256 p.) studies the period after the Haymarket Riots when conservatism became the dominant philosophy of the judiciary and was reflected in the legislation of the 1890's. The fate of the income tax in the Supreme Court was an important expression of the policy. *A History of Lay Judges* by J. P. Dawson (Harvard, 310 p.) considers the judicial systems of Greece and Rome, France and Germany as a background to a study of the manor courts in England which maintained their independence and altered the courts in the Common Law countries. *Frederic William Maitland, Historian,* edited by R. L. Schuyler

(University of California Press, 261 p.) is a convenient paperback reprint of Maitland's most important essays.

MARITAL PROPERTY: *Fraud on the Widow's Share* by W. D. MacDonald (University of Michigan Law School, 477 p.) is a discussion of the protection of a wife's interest in her husband's estate and her election to claim her share as opposed to the will. Emphasis is placed on inter vivos transfers.

MINING LAW: *The American Law of Mining* compiled by the Rocky Mountain Mineral Law Foundation of the University of Colorado (Matthew Bender, 5 v., loose-leaf) is the first comprehensive work to be published since Lindley appeared in 1914. Clyde O. Martz conceived and executed the project. Most of the contributors are practicing attorneys and law professors from Colorado and other mountain states. The first two volumes deal with the public domain including the historical background, mineral rights, prospecting and discovery, leases and titles. Several chapters are devoted to the mining law of Canada, Mexico and South America. Volumes three and four cover mining operations, contracts, companies, labor, radiation, government support, coal leases and royalty interests. The fifth volume is devoted to mineral income taxation and liens. Forms will be included later, as well as several additional chapters and a permanent index.

PHILOSOPHY OF LAW: *The Legal Conscience: Selected Papers of Felix S. Cohen* (Yale University Press, 505 p.) is divided into three parts reflecting the author's interest in logic, law and ethics, the Indian's quest for justice, and the philosophy of American democracy. The articles are reprints from law reviews and other sources.

SAVINGS AND LOAN: *The Savings and Loan Industry in California* by C. J. Clauson (Stanford Research Institute) was undertaken because of the rapid growth of the industry since the war. An analysis of the factors of function, growth, service, market and location comprise the survey. Statistical tables and the form of the questionaire are included.

TAXATION: *Lasser's Encyclopedia of Tax Procedures,* 2d ed. (Prentice-Hall, 1210 p.) contains practical information by various authors divided into five sections dealing with investments, business property, business expenses, corporations and individuals. *The Tax Practice Deskbook* by H. A. Freeman (Little, Brown, 581 p.) is a practical manual on handling claims and procedures before the Internal Revenue Service and Tax Court. *Taxation of Deferred and Executive Compensation,* edited by H. Sellin (Prentice-Hall, 720 p.) deals with qualified plans, non-qualified plans and stock bonuses. The approach is broad, covering accounting and actuarial aspects as well as the law.

NEW PERIODICALS: *Medicine, Science and the Law* published by the British Academy of Forensic Sciences; *Supreme Court Review,* an annual collection of articles critically evaluating the work of the Court, published by the University of Chicago and edited by Philip Kurland.

MISCELLANEOUS: West's *Civil Procedure Forms;* Two new loose-leaf services: Commerce Clearing House's *American Stock Exchange Guide and Labor Arbitration Reports; Sentence and Probation* by Judge Fricke (Legal Book Store, 96 p.).

Association Members Active in A. B. A.

Members of the Los Angeles County Bar Association contribute heavily of their time and talents to the American Bar Association. This service is rendered almost always without fanfare or reward. The Association hereby takes the opportunity to thank these members for their services to the lawyers of the nation. The following is a partial list of Association members active in the ABA and the offices held by them.

BALL, JOSEPH A. – Member, Committee on Legal Aid Work; Member, Committee on Public Relations; Member, Committee on Proposed Revision of Judicial Canon 35; Chairman, National Conference of Bar Presidents.

BARDT, HARRY M. – Representing the American Bankers Association in the National Conference of Lawyers and Representatives of American Bankers Association, Trust Division.

BARGER, RICHARDS D. – Member, Associate and Advisory Committee of the Membership Committee; State Chairman, Junior Bar Conference; Co-chairman, Membership Committee of the Junior Bar Conference,

BARNES, HON. STANLEY N. – Member, Judges' Advisory Committee of the Committee on Professional Ethics; Member, Council of the Section on Judicial Administration; Chairman, Committee on The Law and The Layman of the Section on Judicial Administration.

BEARDSLEY, CHARLES E. – Member, Associate and Advisory Committee of the Committee on Bill of Rights.

BEEBE, JAMES L.–Chairman, Committee on Special Revenue and Authority Obligations of the Section on Municipal Law.

BEEBE, JAMES WARREN – Chairman, Committee on Atomic Attack.

BERGEN, RICHARD C. – Member, Committee on Jurisprudence and Law Reform.

BLACK, HAROLD A. – Member, Council of the Section on Legal Education and Admissions to the Bar.

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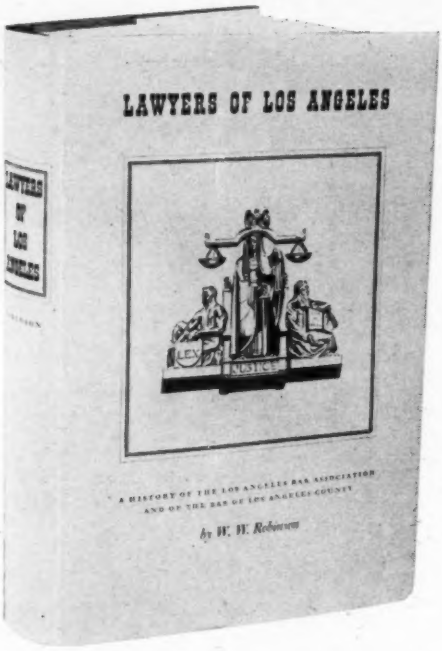
of COURTS *and* MEN



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news from the

AFFILIATED BAR ASSOCIATIONS

As the new year began, many of the affiliated bar associations elected and installed their new officers for 1961. Among these affiliates is the Beverly Hills Bar Association, which installed its officers on January 5. In response, Louis M. Brown, the new president, called to mind the advice of Dean Roscoe Pound that a lawyer could help to improve society by working toward that goal through his profession. Thus, said Mr. Brown, just as lawyers protect and assist the individual in asserting his legal rights, so must associations of lawyers protect and assist lawyers in so doing. He expressed the hope that "it will be to the credit of bar associations everywhere that they helped create the climate which makes it possible for lawyers to 'battle for the law in the interest of society.'" He concluded by referring to Judge Learned Hand's remark that "as a Litigant, I should dread a law suit beyond almost anything short of sickness and death," and suggested that "it is significant for associations of lawyers to explore and to research into the causes of the disease of litigation."

Louis M. Brown

Other newly elected officers of the Beverly Hills association are David B. Heyler, Jr., Vice President; Marvin A. Freeman, Secretary; William R. Jarnagin, Treasurer; and Werner F. Wolfen, Junior Bar President.

On the following day, January 6, the San Gabriel Valley Bar Association inducted into office Stanley Weinstein, President; Stanley D. Clark, Vice President; Robert L. Bacon, Secretary; Babette Gualano Coleman, Treasurer; and Donald R. Krag, Program Chairman.

Stanley Weinstein

On January 9, the Santa Monica Bay District Bar Association greeted is newly elected officers, Andrew E. Colvin, President; Marshall Hickson, Vice President; David M. Durst, Secretary; and Joseph W. Chandler, Treasurer.

Andrew E. Colvin

The Pasadena Bar Association installed its 1961 officers on January 18. Harry J. Crawford is President; Carl E. Wopschall, First Vice President; Paul H. Marston, Second Vice President; Loren H. Russell, Secretary; and Richard M. Darby, Treasurer.

Harry J. Crawford

Newly elected officers of the Long Beach Bar Association were installed January 27. They are: William C. Price, President; James J. Baker, First Vice President; George W. Trammel, Second Vice President; and Richard W. Kelner, Secretary-Treasurer.

William C. Price

On February 3, the Inglewood District Bar Association installed as its 1961 officers, Mark Allen, President; Bob Helms, First Vice President; Russell Moss, Second Vice President; Clyde Malone, Secretary; and A. B. Keel, Treasurer.

Mark Allen

Did You Know? . . .

That it is a misdemeanor wilfully to forge or counterfeit a trademark that has been registered in the Office of the Secretary of State of California, or in the U. S. Patent Office? [Business & Professions Code, Sec. 14321].

That any person may obtain an injunction against another person, firm or corporation that indulges in false or misleading advertising? [Business & Professions Code, Secs. 17500 and 17535].

That there is a $100.00 fine for knowingly marking a copyright notice, *e.g.*, "Copyright 1960 by ....," upon an article, when there is no copyright thereon? [Copyright Law, Sec. 105].

That there is a $500 fine for advertising or marking an article "Patent Pending" or "Patent Applied For," when there is no application pending, or using a false patent number in advertising or on an article to deceive the public? (35 U.S.C. Sec. 50).

That an Assignment of a trademark is invalid unless it is accompanied by the good will of the business symbolized by the mark?

OPINIONS OF THE COMMITTEE ON LEGAL ETHICS LOS ANGELES COUNTY BAR ASSOCIATION

HENRY GRIVI
Chairman, Committee on Legal Ethics Los Angeles County Bar Association

The BULLETIN has in recent years published all of the written opinions of the Committee on Legal Ethics of the Los Angeles County Bar Association. The last publication of such an opinion was in June 1960. Since that time a lack of available space in the BULLETIN has prevented the publication of additional opinions. A substantial number of requests has come to the Association and to the Committee on the BULLETIN that such publication be reinstituted, principally because such publication is the only way the opinions can effectively be publicized. There is no question that the opinions are among the most thoughtful and articulate opinions of any Ethics Committee and may well be the most respected opinions of a local Association other than the opinions of the Ethics Committee of the Bar Association of the City of New York. Consequently, the BULLETIN is pleased to reinstitute the policy of publishing these opinions.—The Editor.

Opinion No. 259

(June 24, 1959)

PRIVILEGED COMMUNICATIONS. In the Absence of His Client's Consent, an Attorney Should Not, in Advance of a Proper Order by a Court of Competent Jurisdiction, Permit Inspection or Possession by Prosecuting Authorities of Documents Which May Be Privileged.

Factual Situation

Late in 1954 A, a California attorney, received a long distance telephone call from a man who identified himself as B, an out-of-state resident. B stated that an uncle, UB, had died intestate, that the estate was being administered by the Public Administrator in A's County, that B believed he was UB's only heir, and that he wished to employ A to establish the relationship and represent B's interest in the estate.

A and B discussed the probable size of the estate and fees and after B gave A his out-of-state address A said he would write B after attending the scheduled hearing on the Petition for Letters of Administration. This he did and thereafter sent B a Power of Attorney and an agreement as to fees, both of which were executed by B and returned to A.

After filing a Request for Special Notice and sending an executed copy of the Power of Attorney to the Public Administrator, A received correspondence from B relating matters of privi-

leged nature, some of which were clearly intended by B to be included in an affidavit of heirship, the filing of which would, of course, impart that information to the public. The affidavit was prepared by A, sworn to by B in the other state, returned to and filed by A in the probate proceeding. It was accepted by the Public Administrator and it thereupon served as the basis for distribution of the entire estate to B with a resulting payment of fee to A in accordance with the contract.

A never saw B and his only communications with B were by long distance telephone and by correspondence.

Long after the estate was closed A learned from newspapers that two men, one from the Public Administrator's office, were arrested and charged with looting several estates, including that of UB, by causing false claims of alleged relationship to the decedents to be filed. The two men are referred to as C and D because A is not aware that either of these men is B. Neither has admitted to being B, nor has either been so declared judicially.

A immediately advised the authorities that he had acted as the attorney in UB's estate and he offered such assistance as would not conflict with his duty to keep privileged communications received from a client inviolate.

He was, nevertheless, requested to disclose the entire contents of B's file relating to UB's estate to the authorities, it being suggested that A had no client because the person who claimed to be B had deceived A and committed a fraud upon him and the Court.

Question

Does A have a legal duty and, therefore, an ethical obligation to refuse to disclose the contents of B's file relating to the UB estate to the prosecuting authorities and in the event that attorneys for C and D should make a similar request to them, too?

Discussion

It is apparent from the recitals which make up the factual situation that interpretation and evaluation are necessary to establish or resolve or find the facts. We must ask, then, should A undertake to conduct the analysis necessary to a decision on his own or should he explore all the facts necessary to present the problem to the first Court which will be called upon to decide whether he should disclose the privileged documents or not. In other words, if he sincerely believes that there is a question concerning the propriety of such disclosure, is he ethically permitted to await a Court's decision before disclosure? If the answer is yes, it is obvious that he should not be forced to make an immediate decision himself.

It would be difficult to contend that the factual situation here is not susceptible to findings along the following lines:

(1) That the man who represented himself to be B became A's client and that he continues to be A's client even though A may at this time suspect strongly that the man committed a fraud upon him and the Court by making false written and oral representations, some of which were carried over into the affidavit filed by A.

(2) That B never informed A that he intended to deceive A or the Court and that A has no knowl-

edge that C or D is B or that either of them was ever associated with B.

(3) That B, whoever he may be, has not acknowledged that he, with or without the participation of others, has deceived A or the Court.

(4) That B has not expressly or impliedly consented to the disclosure of the documents he sent A (the Power of Attorney is specifically excepted because it was intended to be imparted to others, if necessary).

On the other hand, it can be argued and A might reasonably conclude that B impliedly authorized A to disclose the contents and permit inspection of all of the documents he sent to A because he employed A to establish his claim of heirship and to do all things necessary to sustain B's application for monies from the estate of UB. Inasmuch as B had not disclosed any intent to deceive or commit a fraud upon the Court in order to recover money A, in the absence of contrary instructions, might feel obligated to disclose such documents as would rebut a claim of fraud, particularly in the light of the possibility of a collateral attack on the decree of distribution in UB's estate. Some considerable support and comfort for the contention that there might be implied authority to disclose the documents is found in re *Nelson's Estate*, 132 Cal. 182, 64 Pac. 294.

The case involves the right of an attorney to disclose the instructions received by him prior to the preparation of a will. Upon a contest of the will objection was made that such communications were privileged and that the privilege could not be waived inasmuch as the client was then deceased. The lower Court overruled the objection, permitting the testimony, and the Appellate Court affirmed the decision stating, among other things, that by requesting the attorney to draw the will the client impliedly asked the attorney to do and say whatever might at any time and place be requisite for the purpose of establishing the integrity of the will.

In the absence of having concluded that implied authority to make the disclosure exists, A can submit respectable authority in support of his contention that the factual situation should be resolved in favor of privilege. Section 1881 (2) of the California Code of Civil Procedure provides, in part, that "an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment . . ." Rules of Professional Conduct 6068 provides, "It is the duty of an attorney: . . . (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." And 6103 of the same Rules states, "A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constiute causes for disbarment or suspension." Canon 37 of the Canons of Professional Ethics provides, in part, that "it is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . ." The privilege is that of the client, not the attorney, and it cannot be waived by the

attorney without the consent of the client (in re *Fisher,* 51 F. 2d 424, 425; *People vs. Kor,* 129 C.A. 2d 436; *Abbott vs. The Superior Court of Alameda County,* 78 C.A. 2d 19). There is a rebuttable presumption that all communications between the attorney and client in the course of professional employment are confidential (*Sharon vs. Sharon,* 79 Cal. 633, 638; 27 Cal. Jur. 56).

Although it is well settled that where a communication was made with the understanding that it was to be imparted to others, the communication is not privileged (in re Fisher, supra; *Mission Film Corporation vs. Chadwick Pictures Corporation,* 207 Cal. 386, 390), it can be contended that this proposition of law would only apply to communications or parts of communications which were intended to be used in the preparation of the affidavit of relationship and, of course, to the Power of Attorney. The affidavit, of course, is already a matter of public record and, therefore, disclosed and the Power of Attorney is available to the authorities from the files of the Public Administrator. If there are letters from B which contain information of privileged nature not incorporated in other documents made public, such letters must not be disclosed if they also contain privileged material not so incorporated.

This case does not come within the purview of those involving communications between attorney and client having to do with the client's contemplated criminal acts, or in aid of furtherance thereof, wherein it has been held that such acts are not covered by the cloak of privilege (*Abbott vs. Superior Court of Alameda County,* 78 C.A. 2d 19, 21). Here there was no announced intention by client to commit a crime and the attorney can-

not, therefore, properly make a disclosure of documents supplied by the client merely because he, the attorney, suspects from information gained from sources other than the client that a crime may have been committed. The limitation as to the disclosure is expressly stated in Canon 37 of the Canons of Professional Ethics and in Drinker, Legal Ethics, pages 137, 138.

A's reluctance to disclose the allegedly privileged documents results from his desire to have all clients of lawyers make complete disclosures to their attorneys without the fear that others may also be informed. Such an objective has been declared by innumerable Courts to be the basis for making particular communications privileged. See *Holm vs. Superior Court*, 42 Cal. 2d 500, 507; *City and County of San Francisco vs. Superior Court*, 37 Cal. 2d 227; 25 A.L.R. 2d 1418; 8 Wigmore, evidence, Section 2380(a), page 813, and 27 Cal. Jur. 53.

Insofar as A is concerned, the statements comprising the factual situation are, therefore, open to contradictory interpretations. Where this is the case, there is ample legal precedent to establish that the facts may have to be resolved, determined and found by a Court and that its findings may be scrutinized by one or more Appellate Courts if the correctness of the findings is questioned. Holm vs. Superior Court, supra. When the facts are settled in or out of Court the question of privilege becomes a question of law rather than ethics. (Drinker: Legal Ethics, page 132; Opinion 247, Opinions of Committee on Professional Ethics and Grievances of the American Bar Association).

While the committee might have been justified in refusing to give an advisory opinion in this matter because it cannot resolve the facts in dispute and it does not ordinarily render opinions on questions of law, it has proceeded with the discussion because it felt that it would have been unfair to the inquirer to do less. The question of ethics is so closely interwoven with and related to the legal question as to justify an advisory opinion for the consideration of the inquiring attorney.

Opinion

The committee feels that A should not be compelled to interpret the facts and apply the law with such finality at this time as would require him to make an independent decision as to whether or not privilege exists with respect to permitting inspection of the subject documents. It is believed that the rights of the client are paramount and for the best of reasons. Until the client himself, by conduct or words, has relieved the attorney of his responsibility to keep the confidence inviolate, the attorney should continue in the performance of his duty until he is instructed by a proper Order of Court that he must permit inspection of the documents. A should not be compelled to conclude in advance that a Court might find that implied authority had been given by the client B to permit the inspection requested or to be requested.

In fairness to A, it should be disclosed that he voluntarily offered to return the fee received by him in the event it should develop that a fraud had been committed upon the Court in connection with its handling of the estate of UB.

This Opinion, like all other Opinions of this Committee, is advisory only (By-Laws, Article X, Section 3).

by reason of a 'forcible abduction.'"[9] The Court said in the *Ker* case[10] that the defendant may have had an action for trespass and false imprisonment against the federal government, and that Peru may have had an international action against the United States for violation of her sovereignty; it held, however, that the forcible abduction did not make the defendant, who otherwise had a fair trial, any the less guilty.

There is no doubt that Argentina's sovereignty was breached by the illegal abduction. Argentina immediately instigated action in the United Nations Security Council, and after Israel was officially rebuked by the Security Council resolution of June 27, 1960, the nations issued a joint statement on August 3, 1960, that the matter was closed.[11] Argentina did not request Eichmann's return and the Security Council did not order it.

A moral taint lies heavy upon Israel's tactics, but, as a sovereign nation, she is not without precedent in assuming jurisdiction regardless of the manner in which the prisoner was brought before her courts. In addition to the American cases just alluded to, Mussolini and Hitler often had refugees from Fascism kidnapped from other European countries and returned for trial; White Russian civil and military refugees were kidnapped in Paris in the 1930's and smuggled to the U.S.S.R. for disposition; and in the cold-war era following World War II, there have been numerous kidnappings from foreign soil attributed to the Soviets.[12]

Should Eichmann be tried under a law enacted in 1950 for crimes allegedly committed during World War II? The rule prohibiting punishment of crime without *nullum crimen sine lege, nulla poena sine lege,* is a fundamental principle of law, accepted by most nations.[13] The equally well-accepted *ex post facto* rule prevents a defendant from being brought to trial for an act not defined at the time of commission as a punishable offense. Men should know in advance the legal consequences of their acts, that they may be deterred by the prospect of punishment; men should not be penalized for acts that they could not have known would be punishable.

Although the acts attributed to the defendant were morally reprehensible and in violation of the religious mandate "Thou shalt not kill," there was no international statute or case law making genocide punishable during wartime. If Eichmann were standing trial in a nation which had a homicide statute at the time Jews were exterminated under his command, the *ex post facto* argument would have no weight. No Jews were exterminated by Nazis in Palestine, however, and during World War II there was no State of Israel at whose hands Eichmann could expect punishment should Germany lose the war.

The prosecution may argue, how-

[9] "[D]ue process of law is satisfied when one present in court is convicted of a crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Frisbie v. Collins,* 342 U.S. 519, 522 (1952). See also, *U.S. v. Insull,* 8 F. Supp. 311 (1934).

[10] *Supra* note 8.

[11] MINISTER OF DEATH, *op. cit. supra* note 3, at 224, 225.

[12] Roberts, *Eichmann's Trial Raises Complex Legal Problems,* Los Angeles Daily Journal, Sept. 7, 1960.

[13] JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, NUREMBERG, Sept. 30 and Oct. 1, 1946, His Majesty's Stationery Office, London, Cmd. 6964, Misc. No. 12 (1946), p. 38.

ever, that the law under which Eichmann is to be tried, though enacted by Israel in 1950, was actually in existence long before World War II, but in the form of international penal law. The NAZIS AND NAZI COLLABORATORS (PUNISHMENT) LAW[14] contains a definition of "crime against the Jewish people" which is patterned after the U.N.'s 1948 definition of genocide.[15] Furthermore, its definitions of "crime against humanity" and "war crime" are similar to those in the Charter of the International Military Tribunal.[16] That Tribunal has construed its Charter as being coextensive with the preamble of the Hague Convention (written prior to World War II), wherein the parties recognized the validity of the "laws of humanity" as a source of international law.[17] Thus, it can be argued that the Israel law is declaratory of long-existing international penal law, or the "common law of mankind,"[18] which by its nature is based upon precedent rather than legislation; and hence, that *nulla poena* and *ex post facto* rules are inapplicable.

How could Eichmann have known, even had he considered that Germany might lose the war, that international law would hold individual military men personally responsible for acts purportedly furthering their country's war effort? The prosecution will surely cite as precedent the International Military Tribunal at Nuremberg, which decreed that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[19]

Prior to Nuremberg, however, individuals were not considered personally liable for wartime activities on behalf of belligerent nations; these were considered acts of the state, from which individuals were isolated by the sovereignty of the state. Nuremberg established new law based upon the time-honored practice of holding spies personally responsible for their wartime acts.[20] Many prominent legal scholars and statesmen, among them the late Senator Robert Taft bitterly opposed the War Crimes Trials as being nothing more than drumhead

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[13]*Resolution on the Prevention and Punishment of the Crime of Genocide and Text of Convention*, adopted by Gen. Assembly Dec. 9, 1948, 78 U.N. Treaty Series 277 (1948). Art. II defines genocide as: "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . . :

"(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

[16]Charter annexed to Agreement (between United Kingdom, United States, France, USSR) Establishing International Military Tribunal, Aug. 8, 1945. (The principles of law embodied in the Charter and also the Nuremberg Judgment [see note 13 *supra*] were affirmed as international law by the unanimous resolution of the U.N. General Assembly on Dec. 11, 1946. U.N. Gen. Ass. Off. 1st Sess., Plenary 1144 [A/PV 55].) Article 6 of the Charter:

"(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

"(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

[17]Harris, TRAGEDY ON TRIAL, SMU Press, Dallas, 1954, p. 510.

[18]Robinson, *Eichmann & the Question of Jurisdiction*, 30 Commentary 1 (July 1960). It is a well known practice of nations to "transform" international law into domestic law.

[19]JUDGMENT WAR CRIMES TRIBUNAL, *supra* note 13. The Tribunal said: "That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized."

[20]The Tribunal cited *Ex Parte Quirin*, 317 U.S. 1 (1942), in which persons had been charged with landing in the U.S. during the war for purposes of spying and sabbotage.

courts run by the victors against the vanquished which established dangerous precedent on international legal principles of great import, such as the one in question here: personal responsibility vs. sovereignty of the state.

Does the fact that the alleged crimes were not committed on Israel's soil affect her right to jurisdiction over Eichmann? To meet this question the prosecution may argue that the State of Israel, established in 1948, existed *de facto* under the British Mandate, and is but a continuation under a different name of the Jewish "national home" in Palestine;[21] that Palestine was an Allied co-belligerent against Nazi Germany, with its own Jewish units fighting alongside the British; and that Israel, consequently, has the same right to try and punish the enemy for crimes committed against its own people as any other allied co-belligerent.

Many nations accept the principle that a state whose nationals are victims of crimes committed outside her boundaries may nevertheless punish the wrongdoer,[22] but in Eichmann's case, none of the victims were citizens of Israel, nor even of its predecessor, Palestine, when the crimes were committed. On the other hand, it may be argued that the *Final Solution* was directed against the Jewish people, regardless of their nationalities; that if any country could be considered the seat of the Jewish people, it would be Palestine, now Israel; and that Eichmann, himself, recognized this when he dealt with representa-

[21]Robinson, *supra* note 18.
[22]*Ibid.*

tives from Palestine who were bargaining for Jewish lives.[23]

The argument has been advanced that Israel, being a member nation of the international community, may also claim jurisdiction under the principle that certain violations of international law be universally repressed, as the wrongdoers are *hostes generis humani*, enemies of the human race, and may be prosecuted in any country without regard to the locale of the crimes.[24] The seizure of pirates is often used as an example of how this rule was applied in the past. Piracy, however, is limited to acts of violence done without proper authority: "[A]n act cannot be piratical if it is done under the authority of a state, or even of an insurgent community whose belligerency has been recognized."[25] Thus, to apply the piracy principle to Eichmann, who acted under Nazi Germany's authority, may be a tenuous extension.

IV. Practical, Moral, and Emotional Considerations, Re: Jurisdiction

As previously indicated, these considerations may dictate the final decision on the question of jurisdiction:

(1) The kidnapping appears somewhat less reprehensible in the light of the circumstances. He was in Argentina illegally, hiding from capture for his part in the crimes tried at Nuremberg. Argentina, moreover, failed to heed repeated U.N. appeals to all nations for the surrender of other war criminals, as well as West German appeals for extradition of Nazi criminals.[26]

(2) No nation, not even West Germany (which is actually assisting Israel in gathering evidence against Eichmann), has requested the defendant for trial,[27] and since the War Crimes Tribunals were disbanded ten years ago, there have been numerous unsuccessful attempts in the U.N. to establish a permanent international penal court.[28]

(3) With reference to the *ex post facto* argument: query whether any person could not have envisioned it a crime of some sort, punishable by one nation or another to systematically engineer the torture and extermination of millions of helpless human beings?[29]

(4) Israel has the greatest interest in trying Eichmann: The monstrous *Final Solution* was directed against all the Jewish people; almost all of Israel's two million inhabitants are Jewish, and Israel is the only so-called "Jewish State"; there are more than 300,000 survivors of the Nazi atrocities now living in Israel. It is the nation which can best speak for all people of Jewish heritage, if any nation can, and as such, has a duty to tell the world the story of what can happen in a totalitarian state headed by a bigot.

V. Affirmative Defenses

Eichmann's attorney has indicated that the primary defense, other than objections to the court's jurisdiction,

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[23]*Eichmann Tells His Own Damning Story*, 49 LIFE Magazine No. 23, Dec. 5, 1960.
[24]Robinson, *supra* note 18.
[25]J. L. Brierly, THE LAW OF NATIONS, 5th ed., Oxford Univ. Press, London, 1955, p. 240.
[26]Robinson, *supra* note 18.
[27]MINISTER OF DEATH, *op. cit. supra* note 3, at 237. Robinson, *supra* note 18.
[28]Robinson, *supra* note 18. Roberts, *supra* note 7.
[29]Mr. Justice Robert Jackson, after hearing evidence of the atrocities, stated at the Nuremberg trials, "Adolf Eichmann, the sinister figure who had charge of the extermination program, has estimated that the anti-Jewish activities resulted in the killing of six million Jews. Of these, four million were killed by extermination institutions, and two million were killed by *Einsatzgruppen*, mobile units of the Security Police and SD which pursued Jews in the ghettos and in their homes and slaughtered them by gas wagons, by mass shooting in anti-tank ditches, and by every device which Nazi ingenuity could conceive." MINISTER OF DEATH, *op cit. supra* note 3, at 229.

will be that the defendant was following the orders of his superiors.[30] Another possible defense, judging from defense arguments at the War Crimes Trials[31] and from statements made by Eichmann himself,[32] may be military necessity.

"I was merely a little cog in the machinery that carried out the directives and orders of the German Reich," Eichmann has said.[33] Whether he was compelled by his superiors to send Jews in box cars to the firing squads and crematoriums, or whether he was in a position to refrain from doing so, is, of course, a question of fact. From evidence already presented at Nuremberg, and from the mountain of evidence now being compiled in Jerusalem, the prosecution expects to show that the defendant's enthusiasm for the *Final Solution* carried him far beyond the literal confines of his orders. Eichmann's own story, tape-recorded by him before his capture and given to another German fugitive in Argentina, bears this out; he states: "I regret nothing. . . . I will not humble myself or repent in any way. . . . I must say truthfully that if we had killed all the 10 million Jews that Himmler's statisticians originally listed in 1933, I would say, 'Good, we have destroyed an enemy.' "[34]

The law upon which the Israeli Attorney General may rely is found in Article 8 of the International Military Tribunal Charter,[35] which specifies that carrying out orders is not an affirmative defense, but may be considered in mitigation of penalty. The Tribunal in its Judgment said: "[t]hat a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

Military necessity is a possible defense; Eichmann said even before the annihilation order that the world Zionist leader, Dr. Chaim Weizmann, "had declared war on Germany in the name of Jewry. It was inevitable that the answer of the *Führer* would not be long in coming."[36] It also may be argued that the atrocities were in retaliation (which has precedent as a defense under the laws of war) for the merciless bombings of the German homeland by the Allies; Eichmann once justified the exterminations when he said to Hoess (commander of Auschwitz), "[w]hen I see your corpses, I think of those charred German bodies in the air raid shelters in Berlin."[37] These defenses were swept aside in almost every case at the War Crimes trials, as the gore and brutality of the atrocities could not be militarily justified, and in the light of the damning evidence already discovered, these arguments seem no less tenuous in Eichmann's case.

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[30]Feldman, *supra* note 6.

[31]JUDGMENT WAR CRIMES TRIBUNAL, *supra* note 13.

[32]*Eichmann Tells His Own Damning Story*, 49 LIFE Magazine Nos. 22, 23, Nov. 28, Dec. 5, 1960. The tape recordings, sold to LIFE by a friend of Eichmann, were translated by LIFE editor Frank Gibney. Gibney took the tapes to Frau Eichmann, in Argentina, and she authenticated her husband's voice.

[33]49 LIFE Magazine No. 22, Nov. 28, 1960.

[34]49 LIFE Magazine No. 23, Dec. 5, 1960.

[35]*Supra* note 16.

[36]*Supra* note 33.

[37]*Ibid.*

VI. What Penalty?

Should Adolf Eichmann be convicted, what is to be his sentence? Israel has abolished capital punishment except for the crime with which Eichmann is charged, and other offenses against the state during time of war.[38] Hanging is specified as the mode of execution, but there have been no executions since Israel became a state. It seems unlikely that the Israel court would decree anything less than death, as other war criminals have been executed for crimes far less encompassing than Eichmann's. The prosecutor, however, has said he will raise no objection if the court decides on leniency, and the question of the death sentence does not matter to him as long as there is a conviction.[39] Moreover, there is growing sentiment among Jews everywhere that death would be inadequate, and that Eichmann ought to live out his days among the people he tried so hard to destroy. Eichmann's life, taken in payment for the crimes of the Nazis in a sense might let the rest of mankind off the hook, for the terrible things that were done. Is it right for the matter to be finished so quickly? For those who desire an eye-for-an-eye vengeance, his execution would never be satisfactory, as it is quite impossible to kill or torture a man more than once. No punishment could ever be devised to match six million deaths.

The true motive behind this trial, according to Israeli officials, is not to

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[38] 8 Israel Laws 5714-1954.

[39] Coates, *Report From Eichmann's Secret Prison*, Los Angeles Mirror, Nov. 30, 1960. The prosecutor, Gideon Hausner, 45, is the newly-appointed Attorney General of Israel.

achieve revenge or to punish any one person, but instead, to once and for all set before the world the fully documented story of the *Final Solution.*[40] Eichmann's fate, in the long run, is the least important consideration; his trial is but a medium through which the Jewish people will tell of a conspiracy against humanity never before fully revealed. There are still those who refuse to believe that six million persons were systematically and cruelly exterminated by the Nazis, and indeed, when one reads through the testimony of witnesses at the War Crimes Trials, it is difficult to comprehend that such horrible things could happen in a civilized world.

After the evidence is in, the moral of the story will be that it could happen again, even in our lifetime, especially with the now-possessed power to destroy huge quantities of human beings in one fell swoop. The moral is even more poignant when this power exists in the hands of totalitarian states, where a man's conscience and sense of morality may easily give way to orders and directives designed to protect the security and solidarity of the state. The story of the "Final Solution" should be a solemn warning to all humanity.

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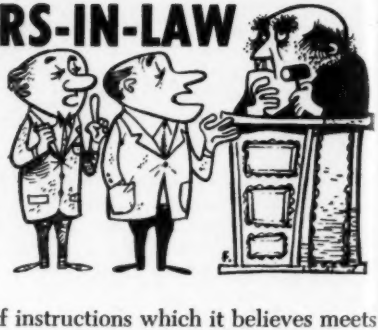
[40]David Ben-Gurion, Prime Minister of Israel, recently said, "We are not out to punish Eichmann; there is no fit punishment. Indeed, it is ridiculous to see in this trial, as some do, any motive of revenge . . . . We want to establish before the nations of the world how millions of people, because they happened to be Jews, and one million babies, because they happened to be Jewish babies, were murdered by the Nazis. We ask the nations not to forget it." *The Eichmann Case as Seen by Ben-Gurion,* The New York Times Magazine, Dec. 18, 1960, pp. 1, 62.

BROTHERS-IN-LAW



By
GEORGE
HARNAGEL, JR.

IPI

Following long and unsuccessful efforts by the **Illinois** State Bar Association and the **Chicago** Bar Association to secure reform in the field of jury instructions, the Illinois Judicial Conference took up the problem in 1954. It caused a survey to be made of all the Illinois cases reversed in a twenty-five year period and found that 38% of them were reversed in whole or in part by reason of errors in instructions. This led the more than 100 members of the Conference to adopt, unanimously, a resolution requesting the Illinois Supreme Court for assistance in correcting this "shocking" situation.

The Court responded by appointing a committee to attack the problem. It consisted of three law professors, five judges and nine lawyers and was designated as "The Supreme Court Committee on Jury Instructions." This committee worked diligently at the job for almost four years. It made an examination of jury instruction practices throughout the country and, among other things, found "the California system of particular interest."

The committee concluded that "to promote substantial justice, pattern jury instructions should be drafted" which would be "conversational, understandable, unslanted and accurate". It went to work and produced a set of instructions which it believes meets those requirements and these have now been published, with annotations and comments, as *Illinois Pattern Jury Instructions* (*IPI*).

In some instances *IPI* recommends that instructions of a certain type be not given and in certain areas, where it felt the law was changing, it did not undertake to prepare instructions.

The work of the committee resulted in the adoption, early this year, of a new rule by the Illinois Supreme Court. This rule provides in part that whenever *IPI* "contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the *IPI* instruction shall be used unless the court determines that it does not accurately state the law." In substance the rule also provides, where an *IPI* instruction is not given, that the instruction which is given shall follow the *IPI* pattern and "be simple, brief, impartial and free from argument."

Preparation of *IPI* and adoption of the new rule is hailed in a recent article in *Illinois Bar Journal* as "probably the most important and most helpful advance in the trial of jury cases in the past 100 years. . ." The author of the article is the chairman of the committee. Perhaps someone

else could have made a more objective appraisal of its work, but we will nevertheless believe it has done an impressive job until we have evidence to the contrary.

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Answer of the Month to Our Question for December

Last December we posed this question: What lawyers have declined appointment to the Supreme Court of the United States?

To which we supplied the following answer given by Mr. Justice Frankfurter: John W. Davis and John G. Johnson.

By some means presently unknown to us our query reached the diggings of K. Frederick Gross, counselor at law, 123 Remsen Street, Brooklyn 1, N. Y., and he has added another name to the list of lawyers who enjoy this unique distinction. It is Robert Hanson Harrison. Mr. Gross informs us that Mr. Harrison declined appointment by President Washington in 1790 because he preferred to be Chancellor of Maryland.

We don't know, but possibly Mr. Harrison thought that a job with an old established organization was more secure than one with a new outfit that didn't have much business.

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Characters and Character Witnesses

The National Conference of Bar Examiners investigates attorney-applicants[1] for Committees of Bar Examiners in most of the states and in the course of doing so writes many thousands of letters of inquiry about such applicants and receives many thousands of answers. The following are excerpts from some of the answers:

(1) Instead of trying to build up a law practice all these years in Washington, I should have built an office building. Are they clamoring for space! The legal (not necessarily legitimate) population of Washington has increased, not by leaps and bounds, but by falls and thuds. Hope you are the same.

(2) We can sum up Joe this way: He probably has a lot of legal talent left in him because no one has got very much out of him.

(3) As to her legal ability, she appears to be well rounded out.

(4) This lady lawyer is an expert in the field of domestic relations. She has had four husbands. One is dead.

(5) Mr. B. has been studying law under Mr. W. It is my thought that he is not at all well prepared. If he learned all the law that Mr. W. knows, I would still not believe he would know enough to pass a bar examination.

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Question of the Month

Q. What justice of the Supreme Court of the United States "served" upon it for two years without even attending one of its meetings and then resigned to become the chief justice of a state supreme court?

A. John Rutledge. He had been the first governor of South Carolina after the Revolution. He resigned from the United States Supreme Court to become Chief Justice of the Supreme Court of North Carolina. He later applied for appointment as Chief Justice of the United States Supreme Court, got an interim appointment and presided for one term, but his appointment was rejected by the Senate as soon as Congress convened.

[1]Attorneys admitted in one state who are applying for admission in another state.

Those Eccentric Englishmen

"The difference in legal ethics which is probably most striking to us is the canon that a barrister may not do what they call 'ginger up the witness.' This means that he is forbidden to see or interview the witness (except his own client and expert witnesses) before or during trial. He must rely solely on the solicitor's brief for information about the witness and what he is expected to say. As can be imagined, this rule has resulted in some very amusing incidents.

"An American trial lawyer would consider it utter folly to put a witness on the stand without discussing the case with him and sizing him up beforehand. If he committed this folly and the witness fell down on the stand (the British say 'fails to come up to his proof') the American lawyer would usually have to shoulder the blame. . . . [In England] neither barrister nor solicitor is considered remiss. The British believe their rules better adapted to revealing the truth . . .

"Our problem of the backlog of cases and frequent continuances of trial because of engagements of counsel elsewhere does not plague the English. They have had a full discovery procedure for many years, and technical objections to the admission of evidence are hardly ever encountered. Juries are infrequent in civil cases . . . If a barrister is engaged elsewhere, he must return his brief. No continuance would be granted or even applied for merely to meet the convenience of counsel."—From an article on the practice of law in England by John V. Lovitt, in *The Shingle* of the **Philadelphia** Bar Association.